CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

MAXINE KEESLING, Petitioner, v. KING COUNTY, Respondent.	)))))))))))	**Case No. 04-3-0024** ***(Keesling III)*** **FINAL DECISION AND ORDER**

SYNOPSIS

*On September 27, 2004 the King County Council adopted the following Ordinances: No.15028 amending the King County Comprehensive Plan and Area Zoning; No.15029 amending King County Code provisions relating to sewer and water comprehensive plans; No.15030 amending King County Code provisions relating to transportation concurrency management; No.15031 amending King County Code provisions relating to administration and subdivisions and short subdivisions; and No.15032 amending King County Code provisions relating to zoning. Maxine Keesling (**Petitioner**) challenged these actions by filing a timely Petition for Review on November 29, 2004. Petitioner argued that amendments to the King County Comprehensive Plan and King County Code did not comply with provisions of the Growth Management Act (**GMA**) and Washington Administrative Code.*

The PFR and briefings addressed nine legal issues presented by Petitioner. On eight of the nine issues the Board concluded Petitioner failed to carry the burden of proof in demonstrating non-compliance with the GMA and dismissed those legal issues. In the remaining issue Petitioner claimed the designation of a portion of the Sammamish Agricultural Production District as both an agricultural resource area and a rural area did not comply with the GMA. The Board agreed and found the dual designation inconsistent and non-compliant with RCW 36.70A.070. The Board ordered King County to take legislative action to comply with the consistency requirements of RCW 36.70A.070 and set a compliance schedule.

I. BACKGROUND[1]

On November 29, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Maxine Keesling (**Petitioner** or **Keesling**). The matter was assigned Case No. 04-3-0024, and is hereafter referred to as *Keesling III*. Board member Bruce Laing is the Presiding Officer (**PO**) for this matter. Petitioner challenges King County's (**Respondent** or the **County**) adoption of the following Ordinances: Ordinance 15028 amending the Comprehensive Plan (**KCCP)** and Area Zoning; Ordinance 15029 amending King County Code (**KCC**) provisions relating to sewer and water comprehensive plans; Ordinance 15030 amending KCC provisions relating to transportation concurrency management; Ordinance 15031 amending KCC provisions relating to administration and subdivisions and short subdivisions; and Ordinance 15032 amending KCC provisions relating to zoning. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**), WAC 365-195, WAC 197-11 and WAC 173-507.

During December, 2004 and January, 2005 the Board issued the Notice of Hearing, conducted a Prehearing Conference (**PHC**) and issued its Prehearing Order (**PHO**). The PHO set a schedule and established legal issues to be decided by the Board.

On January 26, 2005 the Board received from the County Core Documents (**Core**) requested by the Board during the PHC. The documents and their sequential page numbers are as follows: Ordinance 15028 (**Core 0001 – 0018**); County Comprehensive Plan & Maps – Attachment A to Ordinance 15028 (**Core 0019 – 0496);** County Countywide Planning Policies (**Core 0497 – 0587**); Ordinance 15029 (**CoreMK 0001 – 0016);** Ordinance 15030 (**CoreMK 0017 – 0042**); Ordinance 15031 (**CoreMK 0043 – 0048**); Ordinance 15032 (**CoreMK 0049 – 0181**); Notices of Hearings (**CoreMK 0182 – 0244**).

On February 4, 2005 the Board issued its Order on Motions which admitted the Core Documents received from the County on January 26, 2005, the Keesling letter of January 9, 2004 (**Supplemental Exhibit No.1**) and Petitioner's Motion to Clarify Standing (**Supplemental Exhibit No. 2**).

On February 16, 2005 the Board received a one page document entitled "Petitioner's Motion to Supplement the Record".

On February 25, 2005 the Board received a letter from King County transmitting two items: Color copy of Concurrency Map – Chapter 14 marked **CoreMK-245**; Concurrency Map Attachment B marked **CoreMK-246**.

On March 1, 2005 the Board received Petitioner's Preliminary Brief (**PHB**) together with an Index of Issues for Brief, an Index of Exhibits, and attached exhibits. The attached exhibits include pages from the Core Documents and pages marked **MK 1 thru MK 33.** Two additional pages are not numbered.

[1] For more complete details see Appendix – A, Chronological Procedural History.

On March 22, 2005 the Board received Respondent King County's Brief (**Response**) with an Exhibit List and attached exhibits. The attached exhibits include pages from the Core Documents and pages marked **MK 35 thru MK 231.**

On March 31, 2004 the Board conducted a Hearing on the Merits (**HOM**) in Suite 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle, Washington. Board Members present were Margaret Pageler, Edward McGuire and Bruce Laing, Presiding Officer. Maxine Keesling represented the Petitioner, *pro se*. Stephen Hobbs, Senior Deputy Prosecuting Attorney, represented King County. The Court Reporter was Eva Jankovits, Byers & Anderson, Inc. The hearing was opened at 10:10 a.m. and adjourned at 11:46 a.m. Prior the presentation of oral arguments the Presiding Officer denied "Petitioner's Motion to Supplement the Record", received February 16, 2005, on the basis that the body of the motion is a request to amend the Legal Issues set forth in the Prehearing Order. During the HOM the Board directed counsel for the County to determine, and report to the Board, whether the 2003 Countywide Planning Policies cited in the County's brief were the applicable Countywide Planning Policies at the time the County's 2004 Comprehensive Plan was prepared and adopted. The Board did not order a transcript of the HOM.

On April 4, 2005 the Board received Petitioner's Request for Clarification of the Presiding Officer's denial of the February 16, 2005 "Petitioner's Motion to Supplement the Record". The Board's Administrative Officer advised the Petitioner by telephone that the Board had received the Request for Clarification and would address the request in the Board's Final Decision and Order.

On April 4, 2005 the Board received Correspondence from counsel for the County stating "At the time of the passage of the 2004 Comprehensive Plan, the Countywide Planning Policies in effect were identical to the 2003 Countywide Planning Policies attached as a core document in this appeal, with the exception of an amendment ratified June 4, 2004, concerning the City of Auburn's downtown urban core."

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Petitioner challenges King County's adoption of Ordinance No. 15028 through No. 15032. Comprehensive plans and development regulations, and amendments thereto, adopted by King County pursuant to the Act, are presumed valid upon adoption. RCW 36.70A.320(1).

The burden is on the Petitioner to demonstrate that the actions taken by King County are not in compliance with the Act. RCW 36.70A.320(2).

The Board shall find King County in compliance with the Act, unless it determines that the respondent jurisdiction's action was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Act. RCW 36.70A.320(3). For the Board to find (King County's) actions clearly erroneous, the

Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Pursuant to RCW 36.70A.3201 the Board will grant deference to King County in how it plans for growth, consistent with the goals and requirements of the GMA. The State Supreme Court's most recent delineation of this required deference states: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA … cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, [docket number 75076; 2005 Wash. Lexis 371, at 12 of 15 (May 5, 2005)]. The *Quadrant* decision affirms prior State Supreme Court rulings that "Local discretion is bounded, however, by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561, 14 P.3rd 133 (2000) (***King County***). Division II of the Court of Appeals further clarified, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a county's plan that is not 'consistent with the requirements and goals of the GMA." *Cooper Point Association v. Thurston County*, 108 Wn. App. 429, 444, 31 P.3rd 28 (2001); affirmed *Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3rd 1156 (2002) and cited with approval in *Quadrant*, fn. 7 at 13 of 15.

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

III. BOARD JURISDICTION AND PRELIMINARY MATTERS.

A. BOARD JURISDICTION

The Board finds that the Petitioner's PFR was timely filed, pursuant to RCW 36.70A.290(2); Petitioner has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinances, which amend the County's comprehensive plan and development regulations, pursuant to RCW 36.70A.280(1)(a).

B. PRELIMINARY MATTERS

1. Countywide Planning Policies.

During the HOM the Board directed counsel for the County to determine, and report to the Board, whether the 2003 Countywide Planning Policies cited in the County's brief were the applicable Countywide Planning Policies at the time the County's 2004 Comprehensive plan was prepared and adopted. On April 4, 2005 the Board received Correspondence from counsel for the County stating: "At the time of the passage of the 2004 Comprehensive Plan, the Countywide Planning Policies in effect were identical to the 2003 Countywide Planning Policies attached as a core document in this appeal, with

the exception of an amendment ratified June 4, 2004, concerning the City of Auburn's downtown urban core."

2. Petitioner's Motion to Supplement.

On February 16, 2005 the Board received a one page document entitled "Petitioner's Motion to Supplement the Record" which read in pertinent part:

> In writing my brief for the Comprehensive Plan amendments by King County, I find the need to refer to RCW 36.70A.020(6), the protection of property rights, as well as to RCW 36.70A.130, consistency between the Comprehensive Plan and development regulations. As briefing continues, other RCW 36.70A citations may become useful to Petitioner, so Petitioner would appreciate the Board's approving the Petitioner's use of RCW36.70A citations wherever they seem appropriate, including the ones listed … above.

During the HOM, the Presiding Officer denied "Petitioner's Motion to Supplement the Record", received February 16, 2005, on the basis that the body of the motion is a request to amend the Legal Issues set forth in the Prehearing Order. On April 4, 2005 the Board received Petitioner's Request for Clarification of the Presiding Officer's denial of the February 16, 2005 "Petitioner's Motion to Supplement the Record". The Board's Administrative Officer advised the Petitioner by telephone that the Board had received the Request for Clarification and would address the request in the Board's Final Decision and Order.

Petitioner's Request for Clarification notes that Petitioner had sent an identical motion to the Board on another case and received the following response from the Presiding Officer in that matter: "Petitioner's February 16 'Motion to Supplement the Record' is superfluous; the Board will take notice of the referenced statutes as Petitioner cites to them in her briefs and arguments."

The Boards Prehearing Order of January 6, 2004 advised the parties in this case as follows:

> The Board can take official notice of federal and state law and county and city ordinances and resolutions. WAC 242-02-660. The parties do not need to list state statutes or regulations as supplemental exhibits, as the Board has access to them. In contrast, local ordinances and regulations shall be submitted as exhibits, as the Board may not have copies of such documents.

PHO, at 4.

If Petitioner's Motion to Supplement were a request for the Board to take official notice of provisions of the GMA, it would be superfluous. However, in the present case the Presiding Officer interprets Petitioner's Motion to Supplement to be a request to add

sections of the GMA to those cited in specific Legal Issues.[2] Petitioner's Motion is in effect a request to amend the PFR. The Board's Rules of Practice and Procedure include the following provisions for amendments to a PFR:

> (1) A petition for review or answer may be amended as a matter of right until thirty days after its date of filing.
>
> (2) Thereafter any amendments shall be requested in writing by motion, and will be made only after approval by a board or presiding officer. Amendments shall not be freely granted and may be denied upon a showing by the adverse party of unreasonable and unavoidable hardship, or by a board's finding that granting the same would adversely impact a board's ability to meet the time requirements of RCW 36.70A.300 for issuing a final order. The board may, upon motion of a party or upon its own motion, require a more complete statement of the nature of the claim or defense or any other matter stated in a pleading.

WAC 242-02-260.

In this case the PFR was submitted on November 29, 2004 and a Restatement of Legal Issues was submitted on December 17, 2004. The 30 day time period for amending the PFR as a matter of right expired on December 29, 2004. The Motions calendar in this case was completed on February 15, 2004 with the issuance of the Board's Order on Motions. Petitioner's Motion was received by the Board on February 16, 2005. The final schedule for this case established in the PHO set the following deadlines: Petitioner's prehearing Brief – March 1, 2005; Respondent's Prehearing Brief – March 22, 2005; Petitioner's Reply Brief – March 29. 2005. The Hearing on the Merits was scheduled for March 31, 2005. Pursuant to the provisions of RCW 36.70A.300(a) the deadline for the Board's Final Decision and Order was May 31, 2005, 180 days from the date of the PFR.

The Presiding Officer concluded that Petitioner's motion to amend the PFR could not be granted without adversely affecting the Board's ability to issue a Final Decision and Order in this matter by May 31, 2005. During the HOM the Presiding Officer denied Petitioner's motion to amend the PFR.

3. Abandoned Issue.

During the Hearing on the Merits Petitioner abandoned Issue No.1-b.

IV. LEGAL ISSUES[3]

A. Legal Issue No. 1-a

[2] This interpretation is supported by the Petitioner's Prehearing briefing for Legal Issues No. 1, No. 2, No. 4 and No. 7 which expand the sections of the GMA with which non-compliance is claimed beyond those cited in the PFR and the PHO.

[3] See Appendix B - Legal Issues as Stated in the Prehearing Order, *infra*.

Does the King County Comprehensive Plan Ordinance 15028 fail to comply with RCW 36.70A.070 (preamble) because Chapter 5's Parks, Recreation and Open Space Section C.3 Working Resource Lands is inconsistent with the County's Farmland Preservation Program?[4]

Applicable Law

RCW 36.70A.070 provides in part:

> The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW36.70A.140.

Discussion

Petitioner Keesling asserts that the provision of Plan Policy P-111 making farmland owned by the county available for use by small-scale and new farmers, is inconsistent with the county Farmland Preservation Program (**FPP**) which requires, where the county acquires full ownership in any eligible lands, the county shall as soon as practicable offer the agricultural rights to such lands for public sale. PHB at 1. Petitioner argues that the intent of the FPP is to keep as much agricultural land as possible in private rather than governmental ownership. PHB at 2.

Respondent King County asserts there is no inconsistency between the Plan and the FPP. Response at 6. The County argues that the Plan explicitly acknowledges the existence and goals of the FPP and recognizes there are circumstances when it is appropriate to lease farmland to small scale farmers until it is possible to sell the property. Response at 6-7. The County argues that the primary goal of the FPP is to preserve farmland for its resource and open space value rather than to return farmland to private ownership. Response at 8.

To address this consistency issue the Board looks at the applicable provisions of the Plan and the FPP.

KCCP 5.I.C.3 Provides in relevant part:

> **3. Working Resource Lands**

[4] Petitioner's brief on Legal Issue No. 1-a includes assertions of non-compliance with RCW 36.70A.020(6), .070 and .130. Petitioner's statement of this issue in the PFR and Petitioner's Restatement of this issue used in the PHO did not include RCW 36.70A.020(6) nor .130. Petitioner's motion to amend the PFR to include these sections of the Act to statement of legal issues was denied. See Preliminary Matters, *supra*.

> The county's open space system includes lands that are managed as working farms and forests. The county has purchased several properties with the intention of conserving the resource use on the site. County ownership and management of these lands conserves the resource land base, allowing the resource activity to continue, while contributing to the local rural economy, providing education about agriculture and forestry, and providing passive recreational opportunities on some properties. The county's policies to conserve farmland and encourage agriculture are discussed in Chapter 3.
>
> The Farmland Preservation Program (FPP) is a county program that preserves farmland through the purchase of development rights. The farms in the FPP generally remain in private ownership. The county has purchased a farm outright in few cases, with the intention of reselling the land without the development rights to a private farmer. The county has developed a program to lease farms to small scale farmers until such time that the property can be resold.
>
> P-111 Farmland owned by King County shall contribute to the preservation of contiguous tracts of agriculture land and make affordable farmland available for use by small scale and new farmers.
> …
>
> P-113 The use and management of farmlands owned by King County shall be consistent with any requirements imposed by the funding program used to purchase each property and shall serve to meet and enhance the objectives of the King County Agriculture Program.

Core 0152 - 0153

The FPP is codified in KCC 26.04. KCC 26.04.030(F) provides:

> F. If the county shall acquire full ownership in any eligible lands, the executive shall as soon as practicable offer the agricultural rights to such land for public sale at a price not less than the appraised value of such rights. If no offer for such rights is received at the appraised value, the executive may, with the approval of the council, either reoffer the agricultural rights for public sale or lease such land for agricultural or open space use or make such land available for publicly owned open space uses consistent with the purposes of this chapter.

Response, Exhibit No. 2.

The FPP requires the county to offer for public sale, as soon as practicable and at a price not less than the appraised value, the agricultural rights of eligible lands purchased under

the FPP. However the FPP also provides …*" If no offer for such rights is received at the appraised value, the executive may, with the approval of the council, …lease such land for agricultural or open space use or make such land available for publicly owned open space uses consistent with the purposes of this chapter." Id.*

The Working Resource Lands section of the KCCP specifically recognizes the provisions of the FPP: "*The Farmland Preservation Program (FPP) is a county program that preserves farmland through the purchase of development rights. The farms in the FPP generally remain in private ownership. The county has purchased a farm outright in few cases, with the intention of reselling the land without the development rights to a private farmer. The county has developed a program to lease farms to small scale farmers until such time that the property can be resold*."

The provisions of KCCP Policy P-111 directing the county to make affordable farmland available for use by small scale and new farmers are consistent with the provisions of the FPP. Under the provisions of KCCP Policy P-113 the county's use and management of farmlands acquired under the FPP must be consistent with the requirements of the FPP.

Conclusions

Petitioner has failed to show that the provisions of the Working Resource Lands section of the KCCP are inconsistent with the FPP. Petitioner has **failed to carry the burden of proof** in demonstrating that the KCCP is non –compliant with RCW 36.70A.070 or with any other provisions of the ACT. Legal Issue No.1-a is **dismissed.**

B. Legal Issue No. 2

> **Does Parks, Open Space and Cultural Resources Policy P-114 of the King County Comprehensive Plan Ordinance 15028 fail to comply with the requirements of RCW 36.70A.070(5) because it effectively designates significant portions of the Rural Area as Forest?[5]**

Applicable Law

RCW 36.70A.070 provides in relevant part:

> The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use

[5] Petitioner's PHB on this issue asserts non-compliance with RCW 36.70A.020(6). This section of the Act is not included in the statement of the issue in the PFR nor in Petitioner's Restatement of the issue used in the PHO. Petitioner's assertion of non-compliance with RCW 36.70A.020(6) in the PHB is a conclusion without supporting information.

map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

Each comprehensive plan shall include a plan, scheme, or design for each of the following: …

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element: …

(b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

Discussion

Petitioner asserts the provisions of KCCP Policy P-114, requiring that forest land owned by King County provide large tracts of forested property in the Rural Forest Focus Areas (RFFA)[6] has the effect of designating these areas Forest Production District (FPD)[7] and does not comply with the provisions of RCW 36.70A.070(5) requiring counties to include in rural areas lands that are not designated for forest resource use. PHB at 2-3. Petitioner argues that only 15% of the county land base is in the rural area and the designation of large tracts of forest land in the rural area prohibits traditional rural uses such as homes, crops and livestock. *Id,* at 3.

[6] KCCP Policy R-109 describes Rural Forest Focus Areas as follows: "Rural Forest Focus Areas are identified geographic areas where special efforts are necessary and feasible to maintain forest cover and the practice of sustainable forestry. King County shall target funding, when available, new economic incentive programs, regulatory actions and additional technical assistance to the identified Rural Forest Focus Areas. Strategies specific to each Rural Forest Focus Area shall be developed, employing the combination of incentive and technical assistance programs best suited to each focus area. Core Doc at 90.

[7] Forest Production District is the King County land use designation for the Forest Resource Area of the county. KCCP 3.V.A Resource Conservation Strategy states in part: "GMA requires designation of agricultural and forest lands of long-term commercial significance. Agricultural lands of long-term commercial significance are designated as Agricultural Production Districts and forest lands of long-term commercial significance are designated as the Forest Production District as shown on the Agricultural and Forest Lands Map." Core Doc at 107.

In response the County asserts: RCW 36.70A.070(5) specifically encourages forestry in rural areas; The zoning in RFFA remains residential; RFFA are consistent with GMA goals which encourage protection of timber resources, open spaces and the environment; The function of RFFA as sending sites for transfer of development rights is an example of the innovative techniques encouraged by GMA; Of the 246,892 acres of rural land in King County, 52,300 acres is RFFA which does not indicate a crisis in the availability of rural land for other uses. Response at 11-14.

KCCP 5.I.C.3 Provides in relevant part:

> **3. Working Resource Lands**
>
> The county's open space system includes lands that are managed as working farms and forests. The county has purchased several properties with the intention of conserving the resource use on the site. County ownership and management of these lands conserves the resource land base, allowing the resource activity to continue, while contributing to the local rural economy, providing education about agriculture and forestry, and providing passive recreational opportunities on some properties. …
>
> One element of the King County Forestry Program is the conservation of forestland through acquisition to allow forest management on the property. The working forests owned by King County are generally very large parcels of land (several hundred acres or more), which support sustainable forest management practices and contribute to the retention of a contiguous forest. These properties contribute to environmental protection, high-quality passive recreation, the public understanding of forestry, and scenic vistas.
>
> P-114 Forest land owned by King County shall provide large tracts of forested property in the Rural Forest Focus Areas and the Forest Production District (FPD) that will remain in active forestry, protect areas from development or provide a buffer between commercial forestland and adjacent residential development.
>
> P-115 Forest land owned by King County shall be used to sustain and enhance environmental benefits, demonstrate progressive forest management and research, and provide revenue for the management of the working forest lands.
>
> P-116 Forest land owned by King County shall provide a balance between sustainable timber production, conservation and restoration of resources, and appropriate public use.

Core 0152 – 0153.

RCW.36.70A.070(5) requires that the rural element of the KCCP include lands not designated for forest use. However, it also states that the rural element shall permit forestry in rural areas. KCCP policy P-114 regarding RFFA is not inconsistent with RCW 36.70A.070 provided RFFA do not preclude the provision of a variety of rural densities, uses, essential public facilities and rural governmental services within the rural area. The Rural Element of the County Plan, KCCP 3.I and 3.2, provides for a variety of rural densities and uses that are consistent with the rural character.[8] Core 0084 - 0105. The rural areas of the county encompass 246,892 acres of land.[9] 52,300 acres of the rural area is RFFA[10], leaving 194,592 acres of rural area to accommodate a variety of rural uses and densities.

RFFA (Rural Forest Focus Areas) are not the same as the FPD (Forest Production District). RFFA are not designated Forest Lands under the GMA and are not entitled to the industry protections accorded therein. The FPD is subject to King County policies and regulations for Natural Resource lands while RFFA are subject to policies and regulations for Rural lands. The minimum parcel size in RFFA is twenty acres while the minimum parcel size in the FPD is eighty acres. In addition to forestry, RFFA allow rural residential use[11] and serve as the primary "sending sites" under the County's Transfer of Development Rights Program.[12]

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[8] For example KCCP policy **R-101** states: It is a fundamental objective of the King County Comprehensive Plan to maintain the character of its designated Rural Area. The GMA specifies the rural element of comprehensive plans include measures that apply to rural development and protect the rural character of the area (RCW 36.70A.070(5)). The GMA defines rural character (RCW 36.70A.030(14)). Rural development can consist of a variety of uses that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas (RCW 36.70A.030(15)). In order to implement GMA, it is necessary to define the development patterns that are considered rural, historical or traditional, and do not encourage urban growth or create pressure for urban facilities and service. Therefore, King County's land use regulations and development standards shall protect and enhance the following components of the Rural Area: **a**. The natural environment, particularly as evidenced by the health of wildlife and fisheries (especially salmon and trout), aquifers used for potable water, surface water bodies including Puget Sound and natural drainage systems and their riparian corridors; **b.** Commercial and noncommercial farming, forestry, fisheries, mining and cottage industries; **c.** Historic resources, historical character and continuity including archaeological and cultural sites important to tribes; **d.** Community small-town atmosphere, safety, and locally owned small businesses; **e.** Economically and fiscally healthy rural cities and unincorporated towns and neighborhoods with clearly defined identities compatible with adjacent rural, agricultural, forestry and mining uses; **f.** Regionally significant parks, trails and open space; **g.** A variety of low-density housing choices compatible with adjacent farming, forestry and mining and not needing urban facilities and services; and **h.** Traditional rural land uses of a size and scale that blend with historic rural development.

[9] 2003 King County Annual Growth Report. CoreMK 0041 - 0042.

[10] King County Forestry Monitoring Data (2002). CoreMK 0035 - 0039.

[11] See KCCP Policy R-205. Core 0093 - 0094.

[12] See KCCP 3.II.C. Core 0095 - 0096.

Conclusions

The GMA allows forestry in rural areas. RFFA are areas of forestry use in rural areas. Petitioner has **failed to carry the burden of proof** in demonstrating that the KCCP P-114 is non-compliant with RCW 36.70A.070(5). Legal Issue No. 2 is **dismissed.**

C. Legal Issue No. 3

Does the King County Comprehensive Plan Ordinance 15028 fail to comply with WAC 365-195-330(2)(v) – which is authorized by RCW 36.70A.190(4)(b) – and with RCW 36.70A.030(17) because the text preceding Urban Land Use Policy U-182 states the Four-to-One Program's purpose is effectively to seal the urban growth boundary against future expansion?

Applicable Law

RCW 36.70A.030(17) defines Urban Growth as follows:

> (17) "Urban growth" refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170. A pattern of more intensive rural development, as provided in RCW 36.70A.070(5)(d), is not urban growth. When allowed to spread over wide areas, urban growth typically requires urban governmental services. "Characterized by urban growth" refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth.

RCW 36.70A.110(2) provides in pertinent part:

> (2) Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period, except for those urban growth areas contained totally within a national historical reserve.
>
> Each urban growth area shall permit urban densities and shall include greenbelt and open space areas….

RCW 36.70A.190(4)(b) provides:

(4) The department shall establish a program of technical assistance: …

(b) Adopting by rule procedural criteria to assist counties and cities in adopting comprehensive plans and development regulations that meet the goals and requirements of this chapter. These criteria shall reflect regional and local variations and the diversity that exists among different counties and cities that plan under this chapter.

WAC 365-195-330(2)(v) provides:

Rural element.

(2) Recommendations for meeting requirements. The following steps are recommended in preparing the rural element: …

(v) Provisions regulating development at the boundary of urban growth areas so as not to foreclose the possible eventual orderly inclusion of such areas within urban growth areas.

Discussion

The KCCP includes policies for a variety of open space systems including the policies for "Urban Separators and the Four-to-One Program".[13] Petitioner asserts that the purpose of

[13] KCCP 2.I.E provides in part:

E. Urban Separators and the Four-to-One Program

The Countywide Planning Policies call for the county and cities to implement urban separators. Different from the Rural Area and Natural Resource Lands, these are low-density areas within the Urban Growth Area that create open space corridors, provide a visual contrast to continuous development and reinforce the unique identities of communities. …

…

While urban separators complement the regional open space system by helping to define urban communities, the King County Four-to-One Program provides an opportunity to add land to the regional open space system through the dedication of permanent open space. The purpose of the program is to create a contiguous band of open space, running north and south along the main Urban Growth Area Boundary. Changes to the UGA through this program are processed as Land Use Amendments to the King County Comprehensive Plan, subject to the provisions in KCC chapter 20.18.

U-182 King County shall actively pursue dedication of open space north and south along the Urban Growth Area line through the Four-to-One Program. Through this program, one acre of Rural Area land may be added to the Urban Growth Area in exchange for a dedication to King County of four acres of permanent open space.

U-183 King County shall evaluate Four-to-One proposals for both quality of open space and feasibility of urban development. The highest-quality proposals shall be recommended for adoption as amendments to the Urban Growth Area. Lands preserved as open space shall retain their rural area designations and should generally be configured in such a way as to connect with open space on adjacent properties.

…

the Four-to-One Program stated in the KCCP 2.I.3 text "…to create a contiguous band of open space, running north and south along the main Urban Growth Area Boundary", when considered together with KCCP policies U-182 and U-185, conflicts with the provisions of RCW.36.70A.030(17), RCW.36.70A.110(2), and with the provisions of WAC 365-195-330-(2)(v) as authorized by RCW.36.70A.190(4)(b). PHB, at 3-4. Petitioner argues that a continuous band of open space along the Urban Growth Boundary would be a barrier to future expansion of the Urban Growth Area. *Id.*

The procedural criteria in Chapter 365-195 WAC are recommendations and not requirements. Section 365-195-330(2) WAC is entitled "*Recommendations* for meeting requirements." This Board has determined in prior cases that the procedural criteria of Chapter 365-195 WAC are advisory only and do not impose a GMA duty or requirement on local jurisdictions.[14]

The GMA requires counties and cities to plan for open space within and adjacent to urban growth areas.[15] RCW 36.70A.160 states in part: *"Each county and city that is required or chooses to prepare a comprehensive land use plan under RCW 36.70A.040 shall identify open space corridors within and between urban growth areas. They shall include lands useful for recreation, wildlife habitat, trails, and connection of critical areas as defined in RCW 36.70A.030. Identification of a corridor under this section by a county or city shall not restrict the use or management of lands within the corridor for agricultural or forest purposes."*

RCW 36.70A.110(2) requires the County to designate urban growth areas having sufficient capacity to accommodate the urban growth projected to occur in the county over a period of twenty years. This section also states "Each urban growth area shall permit urban densities and shall include greenbelt and open spaces…".[16] The Board addressed the consistency of the Four-to-One program with Chapter 36.70A.110, and with other provisions of the Act, in a prior case*: Vashon-Maury, et al., v. King County (**Vashon-Maury**)*, CPSGMHB Case No. 95-3-0008c (**5308c**) Final Decision and Order (**FDO**), (Oct. 23, 1995). There the Board found as follows:

> FOTL contends that the Four-to-One Program violates the Act because it permits an expanded UGA and is not based upon OFM's population

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> **U-186** Land added to the Urban Growth Area under this policy shall meet the density requirements, shall be physically contiguous to the existing Urban Growth Area and shall be able to be served by sewers and other efficient urban services and facilities. In some cases, lands must meet affordable housing requirements under this program. The total area added to the Urban Growth Area as a result of this policy shall not exceed 4,000 acres.

[14] *King County v. Snohomish County* CPSGMHB Case No. 03-3-0011, 12/15/03 Order, at 4; *Master Builders Association, et al., v. Snohomish County* CPSGMHB Case No. 01-3-0016, Dec. 13, 2001 FDO, at 7.

[15] See RCW 36.70A.020(9), . 070(1), .110(2), .160 and .165.

[16] RCW 36.70A.110(2), *supra*

> projections. Although FOTL raises legitimate concerns about the precedent approval of such a program may set, the Board concludes that the program has sufficient constraints that preclude its abuse. Moreover, the program on its face strongly promotes the retention of open space (*see* RCW 36.70A.020(9)) and assists in complying with RCW 36.70A.160. Finally, FOTL has not overcome its burden of proof to show how a program such as this violates the Act, given its built-in restraints.
>
> RCW 36.70A.090, entitled "Comprehensive Plans–Innovative techniques" provides:
>
> > A comprehensive plan should provide for innovative land use management techniques, including, but not limited to, density bonuses, cluster housing, planned unit developments, and the transfer of development rights.
>
> The Board holds that King County's Four to One Program is the type of innovative land use management technique that the Act encourages. It therefore complies with the Act.

Vashon-Maury, 5308c, FDO at 45-46.

In *Vashon-Maury* the petitioner's concern was that the Four-to-One program might allow expansion of the UGA beyond the area required to accommodate the twenty year population forecast, while Keesling's concern is the potential barrier the open space program might pose to future UGA expansion. Both petitioners cite 36.70A.110 as a basis for their assertions of inconsistency.

The Four-to-One Program continues to incorporate significant constraints including a limitation of 4000 acres in the program[17] and a December 31, 2006 termination date[18] for new applications under the program. The program continues to be an example of the innovative techniques encouraged by the GMA.

Conclusions

The GMA requires jurisdictions to plan for open space corridors within and between urban growth areas. The King County Four-to-One program, KCCP 2.I.3, is an innovative technique for providing open space at the boundary of the urban growth area. Petitioner has **failed to carry the burden of proof** in showing the Four-to-One program to be non-compliant with provisions of the GMA. Legal Issue No. 3 is **dismissed**.

[17] KCCP policy U-186. Core 0058.

[18] KCC 20.18.180.A. Response, Exhibit No. 16.

D. Legal Issue No. 4

Do King County Comprehensive Plan Ordinance 15029's Section 3.E. and Ordinance 15028's Facilities Policy F-231, including F-231's preceding text dealing with Exempt Wells, fail to comply with categorical exemptions under SEPA rule 197-11-800(6)(a) and with WAC 173-507 rules cited by King County, because King County prohibits what state law allows?[19]

Applicable Law

RCW 36.70A.070 provides in pertinent part:

…

Each comprehensive plan shall include a plan, scheme, or design for each of the following:

(1) A land use element … The land use element shall provide for protection of the quality and quantity of ground water used for public water supplies. …

…

(5) Rural element.

(c) … The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:

…

(iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and ground water resources; …

RCW 36.70A.280(1) provides:

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) That the twenty-year growth management planning population

[19] Petitioner's PHB on this issue asserts non-compliance with RCW 36.70A.020(6). This section of the Act is not included in the statement of the issue in the PFR nor in Petitioner's Restatement of the issue used in the PHO. Petitioner's assertion of non-compliance with RCW 36.70A.020(6) is a conclusion without supporting information.

projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

Discussion

Petitioner asserts that Ordinance No. 15029 Section 3.E,[20] KCCP policy F-231 and preceding text[21] related to exempt wells, do not comply with WAC 173-507[22], WAC 197-

[20] Ordinance No. 15029 Section 3.E provides:

> E. In a closed basin, as defined by chapters 173-507, 173-508, 173-509, 173-510 and 173-515WAC, or on Vashon-Maury Island, a private well or a public water system created to provide domestic water for a proposed subdivision and that uses an exempt well under RCW 90.44.050 shall meet the following standards:
>
> 1. The public water system may serve no more than six lots;
> 2. Only one public water system may be created to serve the subdivision;
> 3. The public water system may have only one exempt well, unless more than one exempt well is required to meet water flow requirements; and
> 4. The private well or public water system shall allow no more than one-half acre of irrigation.

CoreMK 0009.

[21] KCCP policy F-231 and preceding text provide:

> Ecology has determined that the rivers and streams in the major river basins in King County have no water available for further consumptive appropriation without harmfully impacting instream values. For that reason, it has by regulation closed those basins to issuance of new water rights, and has directed that the natural interrelationships between surface and ground waters should be considered in future water allocation decisions in order to avoid adverse impacts to instream flows. The installation and use of wells that are exempt from Ecology's water rights permitting process may further harm those rivers and streams when the wells are withdrawing ground water that is directly connected to the water in the stream. The installation of new exempt wells may also create health and safety problems by interfering with the water supplied by existing wells, and by creating more holes in the ground that can lead to contamination of entire aquifers. Under KCC chapter 9.14, the Department of Natural Resources and Parks is to act as lead agency in coordinating the activities of DDES and Public Health in order to ensure that groundwater quality and quantity are protected, and facilitate implementation of the plans that have been developed to protect ground water in five groundwater management areas within King County.
>
> **F-231** New subdivisions with more than six single-family lots on Vashon-Maury Island and in closed basins in the Rural Area (as defined in WAC 173-507, 508, 509, 510, and 515) may not be served by a potable water system using an exempt well, or a combination of multiple exempt wells. One exempt well per subdivision will be permitted unless more than one exempt well is needed to meet the water flow requirements for the six residences. New developments in the Rural Area served by an exempt well, or wells shall not exceed one-half acre of irrigation.

Core 0189.

[22] WAC 173-507-010 provides:

11-800(6)(a)[23] and RCW 90.44.050. PHB, at 4-6. WAC 173-507 contains Department of Ecology rules implementing RCW 90.22-Minimum Water Flows and Levels and RCW 90.54- Water Resources Act of 1971. RCW 90.44 addresses Regulation of Public Ground Waters. WAC 197-11-800(6)(a) is a SEPA Rule relating to the approval of short plats or short subdivisions pursuant to procedures required by RCW 58.17.

The Board's authority is limited to allegations of non-compliance with the requirements of the GMA, the Shoreline Management Act (**SMA**) and SEPA as it relates to plans and development regulations adopted under GMA or SMA. RCW 36.70A.280(1), *supra*. The Board does not have jurisdiction to determine the compliance of Ordinance No. 15029 and KCCP policy F-231 with RCW 58.17, RCW 90.22, RCW 90.44, RCW 90.54 nor the rules related to them, WAC 197-11-800(6)(a) and WAC 173-507.

The GMA requires the County to provide for protection of the quality and quantity of ground water used for public water supplies, and to protect surface and ground water resources in rural areas. RCW 36.70A.070(1) and (5), *supra*. KCCP policy F-231 and preceding text call for limitations on the use of exempt wells in order to protect the quality and quantity of ground water in rural areas. Fn 23, *supra*. This KCCP text and policy are consistent with the provisions of RCW 36.70A.070. Ordinance 15029, Section 3.E, adopts a regulation on the use of exempt wells which is consistent with and implements KCCP policy F-231.

Conclusions

Issue No. 4 asserts non-compliance with rules and statutes which are not within the Board's jurisdiction. KCCP policy F-231 is consistent with the GMA and Ordinance No. 15029 Section 3.E is consistent with KCCP policy F-231. Issue No.4 is **Dismissed.**

> These rules apply to surface waters within the Snohomish River basin, WRIA-7 (see WAC 173-500-040). Chapter 173-500 WAC, the general rules of the department of ecology for the implementation of the comprehensive water resources program, applies to this chapter 173-507 WAC.

[23] WAC 197-11-800(6)(a) provides:

> The proposed actions contained in Part Nine are categorically exempt from threshold determination and EIS requirements, subject to the rules and limitations on categorical exemptions contained in WAC 197-11-305.
>
> …
>
> (6) Minor land use decisions. The following land use decisions shall be exempt:
>
> (a) Except upon lands covered by water, the approval of short plats or short subdivisions pursuant to the procedures required by RCW 58.17.060, but not including further short subdivisions or short platting within a plat or subdivision previously exempted under this subsection.

E. Legal Issues No. 5

Do the King County Comprehensive Plan Ordinances 15028 and 15032 fail to comply with RCW 36.70A.070 (preamble) because of the inconsistency between New Section 50 and Section 19 of 15032's requirement for forced clustering and an undisturbed open space tract covering 75% of the site, and 15028's Rural Legacy Section D Equestrian Communities horsekeeping recommendations and map?[24]

Applicable Law

RCW 36.70A.060 provides in pertinent part:

> (1) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. …
>
> (3) Such counties and cities shall review these designations and development regulations when adopting their comprehensive plans under RCW 36.70A.040 and implementing development regulations under RCW 36.70A.120 and may alter such designations and development regulations to insure consistency.

…

RCW 36.70A.070 provides in pertinent part:

> The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

…

RCW 36.70A.130(1)(b) provides:

> (b) Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

[24] Petitioner's original PFR cited RCW 36.70A.060(3), .100 and .130(1)(b). RCW 36.70A.100 pertains to the consistency of KCCP with the comprehensive plans of other counties or cities. It is not applicable to this issue.

Discussion

Ordinance No. 15032, Section 19, amends KCC 21A.14.040[25] and Ordinance No. 15032, New Section 50, amends KCC 21A.38.130.[26] Petitioner asserts that the amended provisions of KCC 21A.14.040 do not allow agricultural uses on the open space, required by KCC 21A.38.130, in residential subdivisions locating within an agricultural production buffer special district overlay (**APD/SO**). PHB, at 6-7. Petitioner argues that these sections of Ordinance No. 15032 are therefore not consistent with the provisions in KCCP Chapter 3 which identify the location of Equestrian Communities and recommend the adoption of supportive land use regulations for use of these areas for horsekeeping. PHB, at 7.

The County responds that agricultural uses are not prohibited in the open space created through the residential subdivision of property in an APD/SOD. Response, at 26-28. Therefore, the County argues, there is no inconsistency between the provisions of Ordinance No. 15032 and the provisions of the KCCP. *Id.*

The Board looks to the language of the King County Code as amended by Ordinance No. 15032, Section 19 and New Section 50, and the KCCP provisions for Equestrian Communities to resolve these issues.

KCCP 3.I.D provides in pertinent part:

> **D. Equestrian Communities**
> King County recognizes the contributions of equestrian livestock husbandry, training, competition and recreation activities to the overall rural quality of life in King County. As growth occurs, open land to sustain livestock and existing or potential trail segments may be lost to uncoordinated land development and road improvements. Also, ESA requirements may limit livestock management choices and the location of new equestrian facilities on land constrained by large riparian corridors. The equestrian community designation in the Non-Motorized Transportation Plan is based on the presence of some or all these factors in portions of King County's Rural Areas:
> a. Proximity to a regional-level trail, designated by the State of Washington, King County or a city, that is accessible to horses;
> b. Tracts of land on which horseback riding is formally sanctioned or to which equestrian access traditionally has been granted;
> c. Concentrations of residential lots or acreage on which horses are kept;
> d. Commercial or noncommercial stables, riding schools and arenas;
> e. Supporting industries including but not limited to tack shops, feed stores or veterinarians; and
> f. Riding or homeowner associations that promote equestrian activities.

[25] CoreMK 0119 – 0123.

[26] CoreMK 0179 – 0181.

While equestrian uses are permitted throughout the Rural Area, the Equestrian Communities Map identifies those areas where continued equestrian uses are particularly supported and provides a way for rural communities and the county to coordinate various actions to help equestrian activities remain sustainable in King County.
…

R-114 King County's land use regulations should protect rural equestrian community trails by supporting preservation of equestrian trail links in Equestrian Communities, protection of livestock from intrusions from residential development, and encouraging subdivision layouts that preserve opportunities for keeping of horses. Representatives of the equestrian community shall be given the opportunity to review and monitor regulatory and programmatic actions by King County, such as rural area development regulations, that have the potential to affect equestrian uses.
…

Core 0090 - 0091.

KCC21A.14.040 as amended provides in pertinent part[27]:

21A.14.040 Lot segregations - clustered development.
Residential lot clustering is allowed in the R, UR and RA zones. If residential lot clustering is proposed, the following requirements shall be met: …

B. In the RA zone:

…

6. Except as provided in subsection B.7 of this section, open space tracts created by clustering in the RA zone shall be designated as permanent open space. Acceptable uses within open space tracts are passive recreation, with no development of active recreational facilities, natural-surface pedestrian and equestrian foot trails and passive recreational facilities;

7. In the RA zone a resource land tract may be created through a cluster development in lieu of an open space tract. …

Response, Exhibit No. 47.

KCC 21A.38.130 as amended provides:

[27] See Appendix – C for the complete text of amended KCC 21A.14.040.

21A.38.130 Special district overlay - agricultural production buffer.

A. The purpose of the agricultural production buffer special district overlay is to provide a buffer between agricultural and upslope residential land uses. An agricultural production buffer special district overlay shall only be established in areas adjacent to an agricultural production district and zoned RA.

B. The following development standard shall apply to residential subdivisions locating in an agricultural production buffer special district overlay: Lots shall be clustered in accordance with KCC 21A.14.040 and at least seventy-five percent of a site shall remain as open space, unless greater lot area is required by the Seattle-King County department of public health.

CoreMK 0179. Response, Exhibit No. 46.

KCC 21A.38.130(A) provides that the requirements of KCC 21A.38.130(B) for clustering and open space retention can be applied only to areas adjacent to an agricultural production district and zoned RA. KCC21A.38.130, supra. Natural surface pedestrian and equestrian trails are permitted in the open space tracts created by lot clustering in the RA zone. KCC 21A.14.040.B.6. *Supra*. A resource land tract may be created through a cluster development in lieu of an open space tract. KCC 21A.14.040.B.7. *Supra*. The resource land tract may be used as a working forest or farm and thus allow equestrian related activities. KCC 21A.14.040.B.7[28]

Conclusions

The open space areas required by KCC 21A.38.130 permit uses which are compatible with and support equestrian activities. The provisions of KCC 21A.14.040 and KCC 21A.38.130 are consistent with the provisions of KCCP.3.I.D related to Equestrian Communities. Petitioner has **failed to carry the burden of proof** in showing that Section 19 and New Section 50 of Ordinance No.15032 are inconsistent with the provisions of the KCCP related to Equestrian Communities. Issue No. 5 is **dismissed.**

F. Legal Issue No. 6

Does Ordinance 15032, ZONING, Section 17A fail to comply with RCW 36.70A.070 (preamble) because the zoning standards for RA-2.5 and RA-5 are inconsistent with the zoning standards for other residential densities?[29]

[28] See Appendix – C for complete text of KCC 21A.14.040.

[29] Petitioners original PFR cited RCW 36.70A.060(3), .100 and .130(1)(b).

Applicable Law

Petitioner cites the same sections of the GMA for this issue as for Legal Issue No. 5, *supra.* RCW 36.70A.070 requires the comprehensive plan to be an internally consistent document and all elements of the plan to be consistent with the future land use map. RCW 36.70A.100 requires the County comprehensive plan to be consistent with the comprehensive plans of other counties and cities with which the County has common borders. RA-2.5 and RA-5 zoning classifications are development regulations. The consistency requirements of RCW 36.70A.070 and .100 are not applicable to development regulations.

Discussion

Petitioner asserts the base density and development conditions for the RA-2.5 and RA-5 zoning classifications are identical; And the RA-2.5 classification should be eliminated. Petitioner argues that RA-2.5 is the only zone classification which requires a property owner to purchase density credits in order to achieve the base density of the classification. Petitioner asserts owners of property classified RA-2.5 have not been, and are not being, notified of the density credit purchase requirement. PHB, at 8-9.

Respondent asserts the purchase of density credits is not required to achieve the RA-2.5 base density, which according to Respondent is 0.2 units per acre or one unit per 5 acres rather than one unit per 2.5 acres asserted by Petitioner. Respondent argues the reason for the RA-2.5 classification is clearly stated in the KCCP but ignored by Petitioner. Respondent argues the RA-2.5 classification should not be renamed RA-5 because there are substantive differences between the two zones in terms of minimum lot area, minimum interior setback and maximum impervious surface. Respondent asserts Petitioner's arguments regarding inadequate notice are beyond the scope of the legal issue statement, and the County is free to designate the names of zone classifications consistent with the goals of the GMA. Response, at 29-32.

The Board now looks to the provisions of Ordinance No.15032, related provisions of the KCCP and King County Code, and applicable provisions of the GMA to address Petitioner's legal issue.

KCCP policy R-209 provides:[30]

[30] The following text precedes KCCP policy R-209:

> Although King County intends to retain low residential densities in the Rural Area, residential development has occurred in the past on a wide variety of lot sizes. Both existing homes on small lots and rural infill on vacant, small lots contribute to the variety of housing choices in the Rural Area. In some cases, however, rural-level facilities and services (e.g. on-site sewage disposal, individual water supply systems) may not permit development of the smallest vacant lots. The effect of Policy R-209 is to recognize that some of the Rural Area has already been subdivided at a density greater than one lot per five acres (for example, parts of the shoreline of Vashon Island), but not to allow more than one home per five acres on unplatted acreage. Zoning to implement policies R-206 through R-209 has been applied through subarea and local plans and area zoning maps. Core 0094.

> **R-209** The RA-2.5 zone has generally been applied to rural areas with an existing pattern of lots below five acres in size that were created prior to the adoption of the 1994 Comprehensive Plan. These smaller lots may still be developed individually or combined, provided that applicable standards for sewage disposal, environmental protection, water supply, roads and rural fire protection can be met. A subdivision at a density of one home per 2.5 acres shall only be permitted through the transfer of development credits from property in the designated Rural Forest Focus Areas. The site receiving the density must be approved as a Transfer of Development Rights receiving site in accordance with the King County Code. Properties on Vashon-Maury Islands shall not be eligible as receiving sites.

KCCP 3.II.B. Core 0094 – 0095.

KCCP policy R-213 provides:

> **R-213** The top priority of the voluntary Transfer of Development Rights Program is to reduce development in the Rural Area by encouraging the transfer of development rights from private rural lands into the Urban Growth Area. Transfers may also be made to rural sites that have RA 2.5 zoning.

Core 0095.

KCCP policy R-217 provides in pertinent part:

> **R-217** Transfers of development rights may be made to receiving sites as follows:
> a. Rural areas zoned RA-2.5 may receive transfers of development rights from the Rural Forest Focus Areas.
> …

Core 0096.

Ordinance 15032 section 17 amends KCC 21A.12.030 - Densities and Dimensions Residential Zones. This section of the zoning code contains a table of standards and a list of conditions for all King County residential zone classifications, including RA-2.5 and RA-5. The standards for these two zones are the same except the minimum lot area in RA-2.5 is 1.875 acres and the minimum lot area in RA-5 is 3.75 acres. The development conditions for the two zones are the same, but the result of some conditions differs between the two zones. An example pertinent to the issues here is the condition on maximum density. The base density for both RA-2.5 and RA-5 is 0.2 dwelling units per

acre (1.0 units/ 5.0 acres) and the maximum density for both RA-2.5 and RA-5 is 0.4 dwelling units per acre (1.0 units / 2.5 acres). However a condition on the maximum density standard of 0.4 units per acre provides as follows:

> 1. This maximum density may be achieved only through the application of residential density incentives in accordance with KCC chapter 21A.34[31] or transfers of development rights in accordance with KCC chapter 21A.37, or any combination of density incentive or density transfer. Maximum density may only be exceeded in accordance with KCC 21A.34.040.F.1.g. and F.6.

K.C.C 21A.37 contains the general provisions for Transfer of Development Rights (TDR). KCC 21A.37.030 provides in pertinent part:

> A. Receiving sites shall be:
> …
> 3. RA-2.5 zoned parcels… that meet the criteria listed in this subsection A.3. may receive development rights transferred from rural forest focus areas, and accordingly may be subdivided and developed at a maximum density of one dwelling per two and one-half acres. Increased density allowed through the designation of rural receiving areas:
> a. must be eligible to be served by domestic Group A public water service;
> b. must be located within one-quarter mile of an existing predominant pattern of rural lots smaller than five acres in size;
> c. must not adversely impact regionally or locally significant resource areas or environmentally sensitive areas;
> d. must not require public services and facilities to be extended to create or encourage a new pattern of smaller lots;
> e. must not be located within rural forest focus areas; and
> f. must not be located on Vashon Island or Maury Island.
> …

The list of eligible receiving sites for TDR in KCC 21A.37.030 does not include parcels in the RA-5 zone.

Petitioner's assertion that the RA-2.5 and RA-5 are effectively the same is incorrect. These zones differ in significant ways. The minimum lot area in the RA-2.5 is 1.875 acres while in RA-5 it is 3.75 acres. A maximum density of one unit per 2.5 acres can be achieved in RA-2.5 through the transfer of development rights from rural forest focus areas. Under the conditions in KCC 21A.12.030, the maximum density that can be achieved in the RA-5 zone is one unit per 5.0 acres. Petitioner has not shown a basis for eliminating the RA-2.5 zone classification.

[31] Residential density incentives under KCC 21A.34 apply to a specific list of zone classifications. RA-2.5 and RA-5 are not included. KCC 21A.34.

Petitioner asserts that the land use map in the KCCP does not indicate the differences between the RA-2.5 and the RA-5 zone classifications because it shows all Rural Residential areas in the same color. The purpose of the land use map is to show the location of proposed future land uses by categories of use. Rural Residential is one of the land use designations used by the County. The County uses four zoning classifications to implement the Rural Residential land use designation: RA-2.5, RA-5, RA-10 and RA-20.[32] No zoning classifications are shown on the County land use map and their absence does not constitute inadequate notice of the distinctions between individual zoning classifications.

The wording of Petitioner's legal issues suggests that an inconsistency between the zoning standards for RA-2.5 and RA-5 and the zoning standards for other residential densities would be noncompliant with GMA. The standards of individual zoning classifications are by definition different from one another. They provide for types and intensity of uses. These differences are not contrary to the provisions of GMA.

Petitioner's assertion, that the County has not given adequate notice of the conditions under which a density of one unit per 2.5 acres can be achieved in the RA-2.5 zone, is incorrect. The development standards and conditions for the RA-2.5 zone are contained in Ordinance 15032 Section 17. Petitioner has presented no evidence or argument that the notice or public participation process leading to the adoption of Ordinance 15032 was inadequate. The conditions for development in the RA-2.5 zone refer to requirements in specific sections of the County zoning code. The referenced sections must be read in order to understand the conditions. Using references, instead of repeating the text of the referenced material is a common and necessary practice in the zoning codes of large jurisdictions. It does not constitute inadequate notice.[33]

Conclusions

Petitioner has **failed to carry the burden of proof** in showing that Ordinance No 15032, Section 17 is non-compliant with the Act. Legal issue No. 6 is **dismissed.**

[32] KCCP 9.I. Core 000239.

[33] The base density for the RA-2.5 zone classification is equivalent to one dwelling unit per five acres. KCC 21A.12.030(A). The RA-2.5 zone classification is the only Rural Residential (RA) classification in which the numerical designation of the zone is not equivalent to the base density in acres per dwelling unit. The other RA zones and equivalent base densities are: RA-5 = 1du / 5 acres; RA 10 = 1du / 10 acres; and RA-20 = 1du / 20 acres. *Id.* It is likely that the public would think the base density of parcels having an RA-2.5 classification would be one dwelling unit per 2.5 acres. This appears to be an unnecessary cause for confusion which the County could remedy by selecting a zone designation that communicates the concept of a base density which can be increased under specific conditions.

G. Legal Issue No. 7

Do King County Comprehensive Plan Ordinance 15028 Transportation Policies T-206, T-207, T-210 and T-302 and Rural Policies R-201 and R-203, plus text preceding R-203, fail to comply with the requirements of RCW 36.70A.070(6) and WAC 365-195-510 because they fail to implement and be consistent with the land use element?[34]

Applicable Law

RCW 36.70A.070 provides in pertinent part:

> The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.
>
> Each comprehensive plan shall include a plan, scheme, or design for each of the following:
>
> (1) A land use element designating the proposed general distribution and general location and extent of the uses of land, where appropriate, for agriculture, timber production, housing, commerce, industry, recreation, open spaces, general aviation airports, public utilities, public facilities, and other land uses. The land use element shall include population densities, building intensities, and estimates of future population growth. The land use element shall provide for protection of the quality and quantity of ground water used for public water supplies. Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound.
> …
>
> (6) A transportation element that implements, and is consistent with, the land use element.

[34] Petitioner's PHB on this issue asserts non-compliance with RCW 36.70A.020(6). This section of the Act is not included in the statement of the issue in the PFR nor in Petitioner's Restatement of the issue used in the PHO. Petitioner's assertion of non-compliance with RCW 36.70A.020(6) in the PHB is an unsupported conclusion.

(a) The transportation element shall include the following subelements:

(i) Land use assumptions used in estimating travel;

…

Discussion

Petitioner asserts that KCCP policies T-206, T-207, T-210 and T-302 and Rural Policies R-201, R-203 and related text[35], result in level of service standards (**LOS**) for rural areas

[35] **T-206** The transportation system in the Rural Area and Natural Resource Lands should be consistent with their rural/resource character. Projects will be prioritized to address safety, operations, and capacity improvements that correct existing deficiencies or serve development that is already in the permitting process. All projects should emphasize safety, maintenance, and environmental quality.

T-207 King County shall not construct and shall oppose the construction by other agencies of any new arterials or freeways or any additional arterial or freeway capacity in the Rural Area or Natural Resource Lands except for segments of certain arterials that pass through rural lands to serve the needs of urban areas. Any capacity increases to these urban connector arterials shall be designed to serve mobility and safety needs of the urban population while discouraging development in the surrounding Rural Area or Natural Resource lands.

T-210 The level of service (LOS) standard for the Urban Area and designated Rural Towns shall be E except as provided in Policy T-209. The LOS standard for the Rural Area shall be B except as provided in Policy T-209. These standards shall be used in concurrency testing.

T-302 Transportation improvements should be designed, built, and operated to minimize air, water and noise pollution and the disruption of natural surface water drainage in compliance with provisions and requirements of applicable federal, state and local environmental regulations. Natural and historic resource protection should also be considered. Particular care should be taken to minimize impacts where the location of such facilities could increase the pressure for development in sensitive areas or rural or resource lands.

Core 0168 – 0171.

R-201 A low growth rate is desirable for the Rural Area, including Rural Towns, to comply with the State Growth Management Act, prevent sprawl and the overburdening of rural services, reduce the need for capital expenditures for rural roads, maintain rural character and protect the environment. King County shall focus its resources on the unincorporated Urban Area until such time that these areas become part of cities. All possible tools may be used to limit growth in the Rural Area. Appropriate tools include land use designations, development regulations, level-of-service standards and incentives.

The use of land and the density of development (measured as the number of homes or other structures per acre or per square mile of land) are key determinants and contributors to the character of the Rural Area, as described above in Section A. While human settlement of King County's Rural Area has a wide variety of uses and densities, both the historical and desirable range of uses and densities defined here are necessarily narrower and less intense than that found in the Urban Area. Residential development at very low densities (including the land for accessory uses, on-site sewage disposal and local water supply) consumes or will consume most of the land in the Rural Area. Residential density may be the single, most important factor in protecting or destroying rural character that can be influenced by government policies and regulations. Low overall densities in the Rural Area will be achieved through very large minimum lot sizes or limited clustering at the same average densities when facilities and services permit (for example, soil conditions allow on-site sewage disposal on smaller lots). The Rural Area cannot be a significant source of affordable housing for King County residents, but it will contain diverse housing opportunities through a mix of large

which prohibit development necessary to accommodate "GMA approved rural growth densities and farm-truck traffic." PHB, at 7-10. Petitioner argues the cited policies do not comply with RCW 36.70A.070(6) because they are not consistent with, and do not implement the KCCP land use element. *Id*. Petitioner asserts the County's policies do not comply with WAC 365-195-510[36] because they promote the denial of development as the County's regulatory response to the absence of concurrency. *Id*.

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lots, clustering, existing smaller lots and higher densities in rural cities and Rural Towns, as services permit.

Future development in the Rural Area will, to a great extent, be controlled by the availability of transportation concurrency. Concurrency certificates are issued only to proposed developments that meet strict level of service standards. In the Rural Area, this standard is an average volume/capacity ratio of 0.69 during the afternoon peak period. Many of the traffic zones in the Rural Area are near or already out of compliance; therefore proposed subdivisions are being denied concurrency certificates. In the Transportation Chapter, policies prevent the construction of road projects in the Rural Area for the purpose of increasing road capacity, meaning that these zones will remain out of compliance.

R-203 The Rural Area should have low residential densities that can be sustained by minimal infrastructure improvements such as septic systems and rural roads, cause minimal environmental degradation and impacts to significant historic resources, and that will not cumulatively create the future necessity or expectation of urban levels of services. Concurrency certificates for proposed new subdivisions in the Rural Area shall not be issued if trips generated by such subdivisions would exceed rural transportation level-of-service standards.

Core 0092 - 0093

[36] **WAC 365-195- 510** provides in pertinent part:

(1) Transportation. The aim of transportation planning for local jurisdictions is to achieve concurrency for transportation facilities. If concurrency for transportation facilities is not achieved, development may not be approved.
…

(3) Levels of service. The concept of concurrency is based on the maintenance of specified levels of service with respect to each of the public facilities to which concurrency applies. For all such facilities, planning jurisdictions should designate appropriate levels of service.

(a) Transportation. The designation of levels of service in the transportation area will be influenced by regional considerations. For transportation facilities subject to regional transportation plans under RCW 47.80.030, local levels of service should conform to the regional plan. Other transportation facilities, however, may reflect local priorities.

(b) Levels of service should be set to reflect realistic expectations consistent with the achievement of growth aims. Setting such levels too high could, under some regulatory strategies, *result in no growth*. As a deliberate policy, this would be contrary to the act.

(4) Regulatory response to the absence of concurrency. The plan should provide a strategy for what happens when approval of any particular development would cause levels of service for concurrency to fall below the locally adopted standards. Denial of approval is statutorily required only in the area of transportation facilities. *To the extent that any jurisdiction uses denial of development as its regulatory response to the absence of concurrency, consideration should be given to defining this as an emergency for the purposes of the ability to amend or revise the comprehensive plan.*

The procedural criteria in WAC 365-195 are recommendations and not requirements. This Board has determined in prior cases that the procedural criteria of WAC 365 -195 are advisory only and do not impose a GMA duty or requirement on local jurisdictions.[37] In addition, Petitioner has not demonstrated that the County's policies would "…result in no growth…" which is the concern of WAC 365-195-510(b). The provisions of WAC 365-196-510(4) do not prohibit a jurisdiction from using "…denial of development as its regulatory response to the absence of concurrency."[38] Instead these provisions suggest that, if a jurisdiction is concerned with an absence of concurrency, it should consider defining the absence of concurrency to be an emergency "…for the purposes of ability to amend or revise the comprehensive plan." [39] Here the County is not concerned with the absence of concurrency. It is using the absence of concurrency as one of the measures to control new residential subdivisions and promote low density uses in rural areas.[40]

Petitioner's assertion that the cited policies are inconsistent with the Land Use Element of the KCCP are primarily based on arguments pertaining to the provisions of WAC 365-195-510 addressed above. On the underlying issues of compliance between the transportation element and land use element of the KCCP, the policies cited by the petitioner indicate compliance between the policies of these elements. KCCP Policies R-201, R-203 and related text are part of the land use policies for rural areas set forth in KCCP.3.II - Rural Densities and Development. R-201 states in part: "A low growth rate is desirable for the Rural Area … to … reduce the need for capital expenditures for rural roads … Appropriate tools include … level of service standards." R-203 states in part: "The Rural Area should have low residential densities that can be sustained by minimal infrastructure improvements such as … ruralroads, … concurrency certificates for proposed new subdivisions in the Rural Area shall not be issued if trips generated by such subdivisions would exceed rural transportation level-of-service standards." A reading of these policies together with transportation policies T-206, T-207, T-210 and T-302 indicates that that the transportation policies are consistent with and implement the land use policies for rural areas.

The County has set a high level of service standard for rural areas.[41] Petitioner obviously disagrees with the County on the LOS standard. However, under GMA, setting the LOS standard is a policy decision left to the discretion of local elected officials.[42]

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[37] *King County v. Snohomish County* CPSGMHB Case No. 03-3-0011, 12/15/03 Order, at 4; *Master Builders Association, et al., v. Snohomish County* CPSGMHB Case No. 01-3-0016, Dec. 13, 2001 Final Decision and Order, at 7.

[38] *Jody McVittie, et al., v. Snohomish County*, CPSGMHB Case No. 99-3-0016c Feb. 9, 2000 Final Decision and Order, at 29; *Renay Bennett, Jan Benson and East Bellevue Community Council v. City of Bellevue*, CPSGMHB Case No. 01-3-0022c, Apr. 8, 2002 Final Decision and Order, at 12.

[39] See RCW 36.70A.130(2)(b).

[40] See KCCP policy R-201. *Supra.*

[41] See KCCP policy T-210. *Supra*.

[42] *West Seattle Defense Fund v. City of Seattle*, CPSGMHB Case No. 94-3-0016, Apr. 4, 1995 Final Decision and Order, at 60.

Petitioner asserts the County has "…arbitrarily and capriciously covered up the manipulation" of criteria used in concurrency tests for development proposals in rural areas. PHB, at 10. Petitioner relies on two items as support for this assertion. The first is the following sentence which was in the County Executive's proposed policy T-302 but not in the policy adopted by the County Council: "Measures to consider to provide protection from pressure for development include arterial access restrictions and exclusion of the new capacity improvements from the concurrency test used to pre-certify development proposals." *Id.* The second is the following quote from a King County Hearing Examiner's report: "…the deliberate insertion of incorrect data or analysis assumptions into the concurrency determination process would constitute arbitrary and capricious action." *Id.* These items do not show that the County has either manipulated or covered up the manipulation of criteria used in the concurrency test.

Conclusions

The procedural criteria of WAC 365 -195 are advisory only and do not impose a GMA duty or requirement on the County. Petitioner has not shown the transportation policies of the KCCP to be inconsistent with the land use policies of the KCCP. Petitioner has **not carried the burden of proof** in showing that KCCP policies T-206, T-207, T-210, T-302, R-201, R-203, and related text are non-compliant with RCW 36.70A.070. Legal Issue No. 7 is **dismissed.**

H. Legal Issue No. 8

> **Does the King County Comprehensive Plan Ordinance 15028 Resource Lands' Policy R-538 fail to comply with RCW 36.70A.070 (preamble) and with RCW 36.70A.030(15) because the inclusion of a Rural-zoned AG-BUFFER area WITHIN an Agricultural Production District is inconsistent with the supposed-to-be undesignated-as-ag nature of a designated Rural Area?**

Applicable Law

RCW 36.70A.030(15) provides:

> (15) "Rural development" refers to development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW 36.70A.170. Rural development can consist of a variety of uses and residential densities, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.

RCW 36.70A.070 provides in relevant part:

> The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.
>
> Each comprehensive plan shall include a plan, scheme, or design for each of the following:
>
> (1) A land use element designating the proposed general distribution and general location and extent of the uses of land, where appropriate, for agriculture, timber production, housing, commerce, industry, recreation, open spaces, general aviation airports, public utilities, public facilities, and other land uses. …
> …
>
> (5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. …

Discussion

KCCP policy R-538 provides:

> **R-538** All parcels within the boundaries of an APD should be zoned Agricultural, either A-10 or A-35. If small parcels in the APD are not zoned for Agriculture, permitted nonresidential uses must not conflict with agricultural uses in the APD.

Core 0114

Petitioner asserts that designating rural zoned land, located within an agricultural production district (**APD**)[43], as an agricultural buffer is not logical and is not consistent

[43] KCCP3.V.A Resource Conservation Strategy, provides in pertinent part:

> GMA requires designation of agricultural and forest lands of long-term commercial significance. Agricultural lands of long-term commercial significance are designated as Agricultural Production Districts and forest lands of long-term commercial significance are designated as the Forest Production District as shown on the Agricultural and Forest Lands Map.
> …
> **R-505** Farm lands, forest lands and mineral resources shall be conserved for productive use through the use of Designated Agriculture and Forest Production Districts and Designated Mineral Resource Sites where the principal and preferred land uses will be commercial resource management activities, and by the designation of appropriate compatible uses on adjacent rural and urban lands.

with the definition of rural development in RCW 36.70A.030(15). PHB, at 11-12. Petitioner argues that KCCP policy R-538 adopted by Ordinance No. 15028 is the basis for this inconsistent designation and therefore Ordinance No. 15028 is inconsistent with RCW 36.70A.030(15).[44] PHB, at 11. Petitioner asserts the inconsistency can be cured by removing rural zoned land from the APD and by deleting the last sentence of policy R-538. PHB, at 13.

In response, the County asserts that the agricultural buffer designation results from a Special District Overlay – Agricultural Buffer. Response, at 39. The County argues that KCCP R-538 does not create or require a special district overlay and Petitioner has not shown that an agricultural buffer within an agricultural production district is inconsistent with the GMA. Response, at 40-43.

Respondent argues that the following matters raised in the PHB are outside the scope of Petitioner's legal issue: "…(1) objections to 1995 technical amendments rezoning some rural land in the Agricultural Production District, (2) the alleged lack of notice to rural zoned landowners that their property was to be included in the Sammamish Valley APD, (3) allegations concerning the process by which property owned by Woodinville Alliance Church was removed from the APD, (including references to Hearing Examiner decisions and actions by County staff), (4) allegations that the Council improperly decided to table her request to rezone the property in question, (5) allegations (attributed to unnamed council members) concerning a plan to remove all property with buildings from the APD, (6) allegations concerning the sale of County property to create a farmer's market, (7) allegations concerning Ms. Keesling's docket request to rezone certain property and the subsequent Area Zoning Study, and (8) the allegation that the 'Brown's' have been treated arbitrarily and capriciously by the County." Respondent asserts that most of the above allegations are unsupported by any documentation or factual proof.

Other than the Area Zoning Study item (7) which both parties included in their briefs, the Board has taken the items challenged above to be background material rather than issues Petitioner is asking the Board to address. However, to the extent the Petitioner intends these matters to be issues for Board decision, the Board concurs with Respondent that they are beyond the scope of Petitioners legal issue and are therefore **dismissed**.

Both Petitioner and Respondent reference, and attach to their briefs, the following two documents: 1) 2004 King County Comprehensive Plan Update – Area Zoning Study – Sammamish Agricultural Production District – Northeast Area. (**Area Zoning Study)**

Core 0107

> **R-536** Agricultural Production Districts are blocks of contiguous farmlands where agriculture is supported through the protection of agricultural soils and related support services and activities. Roads and natural features are appropriate boundaries for Agricultural Production Districts to reduce the possibility of conflicts with adjacent land uses.

Core 0114

[44] Petitioner raises several other issues in the process of presenting historical and procedural information related to the asserted inconsistency, and the County has responded. The Board addresses those issues below.

MK 116- 122, Ex 58**;** 2) Docket Form – King County Comprehensive Plan – September 16, 2002 – Maxine Keesling –Agricultural Production District. (**APD Docket Item**). MK 123-127, Ex 59.[45] The APD Docket Item, which was submitted to the County by Petitioner in September of 2002 for consideration in the County's 2003 comprehensive plan update, proposes in part "…the RA-2.5-zoned properties on the north edge of the Sammamish Valley APD, adjoining downtown Woodinville, should be removed from the APD, as has already been done in the other APD areas of King County as 'technical corrections.'" PHB, at 12 and MK 123. The County considered the APD Docket Item in 2003 and deferred docket review until the 2004 comprehensive plan update. The APD Docket Item led to the preparation of the Area Zoning Study. PHB, at 12. During the 2004 comprehensive plan update process the docket request was denied. PHB, at 13.

The Area Zoning Study describes the area (**area**) which is the focus of Legal Issue No. 8 as follows:

> This is an area of approximately 29 acres located in the Sammamish Agricultural Production District (Sammamish APD). The area is designated Rural Residential on the King County Comprehensive Plan Land Use Map. The zoning for the area is RA-2.5-SO, Rural Residential – one home per 2.5 acres within a Special District Overlay (SO). The area is within the Significant Trees SO and the Agricultural Buffer SO.

MK 116

Petitioner claims the designation of the area as both APD and Rural does not comply with the consistency requirements of RCW 36.70A.070 and the definition of Rural Development in RCW 37.70A.030(15). And Petitioner ties the inconsistency to KCCP policy R-538. Legal Issue No. 8, *supra*

The area is part of the Sammamish Valley Agricultural Production District designated in the County's 1985 Comprehensive Plan and subsequently designated by the County as agricultural resource under the GMA. KCCP.3.V.A. Core 0107. Agricultural Production District (APD) is the County's designation for agricultural lands of long-term commercial significance. *Id.* This area is designated Agricultural Production District on the Agricultural and Forest Lands Map in the KCCP. MK 40 and Core 0117. The area is also designated Rural Residential on the King County Comprehensive Plan Land Use Map. Area Zoning Study, at MK 116.

RCW 36.70A.070 requires, among other things: The County's comprehensive plan shall be an internally consistent document and all of it's elements shall be consistent with the future land use map; The plan shall include a land use element designating land for agriculture, timber production, housing, commerce, industry, and other land uses; The

[45] Petitioner refers to these same documents by the following Exhibit No.'s: 1) Area Zoning Study / MK 26 – 32; 2) APD Docket Item / MK 000012 – 000017. For convenience one set of exhibit numbers is used in this discussion. The County's exhibit numbers are used because those exhibits are the most legible.

plan shall include a rural element "…including lands that are *not designated for* urban growth, *agriculture*, forest or mineral *resources*." RCW 36.70A.070, *supra*.

The dual designation of the area as APD and Rural Residential does not comply with the GMA provision that rural areas not include agricultural resource lands. The designation of the area as agricultural resource (APD) on the Agricultural and Forest Resource Map is inconsistent with the designation of the area as Rural on the Land Use Map. The dual designation does not comply with the consistency requirements of the RCW36.70A.070.

Petitioner requests the Board to direct the County to cure the inconsistency by removing rural designated lands from the Sammamish APD. PHB, at 13. While the Board agrees the County should resolve the inconsistency inherent in the designation of the area as both agricultural resource land and rural, determination of the specific redesignations are a matter for the County to decide in accordance with the provisions of the GMA. Past Board decisions have included the following conclusions: *RCW 36.70A.020(8), .060, and .170, when read together, create an agricultural conservation imperative that imposes an affirmative duty on local governments to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural resource industry*.[46]; And *The GMA's provisions for the conservation of natural resource lands, including agricultural lands, constitutes on of the Act's most important and directive mandates.*[47]

Policy R-538 states that all parcels within an APD should be zoned Agriculture with a minimum parcel size of either 10 acres or 35 acres. It also recognizes that small parcels not zoned for agriculture may exist in an APD, in which case uses on those parcels must not conflict with agricultural uses. The policy is not the cause of the dual designations in the subject area.

Conclusion

The dual designation of the area as APD and Rural Residential does not comply with the GMA provision that rural areas not include agricultural resource lands. The designation of the area as agricultural resource (APD) on the Agricultural and Forest Resource Map is inconsistent with the designation of the area as Rural on the Land Use Map, all as contained in the King County Comprehensive Plan adopted by Ordinance 15028. The dual designation does not comply with the consistency requirements of the RCW36.70A.070. The County will be directed to correct the inconsistency caused by the dual designation in compliance with the provisions of the GMA.

[46] *Upper Green Valley Preservation Society v. King County*, CPSGMHB Case No. 98-3-0008c, Final Decision and Order, at 16. (Jul. 29, 1998).

[47] *Richard L. Grubb v. City of Redmond*, CPSGMHB Case No. 00-3-0004, Final Decision and Order, at 8. (Aug. 10, 2000)..

I. Legal Issue No. 9

Does King County Comprehensive Plan Ordinance 15031's Section 4 fail to comply with the requirements of RCW 36.70A.070 (preamble) and with RCW 36.70A.035(2)(a) and with RCW 36.70A.140 and with RCW 36.70A.020(6) and (11) because effects of the addition of three words "minimum lot area" to the Building Site definition are unknown due to the issue's very last-minute adoption without public notice or any dissemination or citizens' participation, and potential inconsistency with long-standing county assurances of the vesting of existing legal lots?

Applicable Law

RCW 36.70A.020 provides in pertinent part:

> The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:
>
> (6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.
> …
>
> (11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.
> …

RCW 36.70A.035 provides in pertinent part:

> (1) The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulation. Examples of reasonable notice provisions include:
>
> (a) Posting the property for site-specific proposals;

(b) Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal;

(c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;

(d) Placing notices in appropriate regional, neighborhood, ethnic, or trade journals; and
(e) Publishing notice in agency newsletters or sending notice to agency mailing lists, including general lists or lists for specific proposals or subject areas.

(2)(a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city chooses to consider a change to an amendment to a comprehensive plan or development regulation, and the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change.

…

RCW 36.70A.070 provides in pertinent part:

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

RCW 36.70A.140 provides:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting legislation in response to the board's decision pursuant to RCW 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city

> shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

Discussion

Petitioner asserts the words "minimum lot area" were added to the amended definition of "Building Site" in Ordinance No. 15031 Section 4 without public notice of the added wording until after the Ordinance was adopted. PHB, at 14. The County responds by citing the notice and opportunities for public participation provided by the County, which the County argues comply with requirements of the GMA. Response, at 45-50.

It is uncontested that the wording "minimum lot size" was not included in the County Executive's proposed ordinance amending KCC 19A. Response, at 45. Rather, it was raised for the first time in a public meeting of the King County Council Growth Management and Unincorporated Areas Committee (**GMUAC or Committee**) on July 13, 2004,[48] as an amendment added by a council member through the committee chairperson.[49] Copies of the draft amendment were made available to the members of the public who attended this meeting and public testimony was taken by the committee.[50] The proposed amendment was on the agenda of the GMUAC meeting held on July 20, 2004.[51] Copies of all proposed amendments were distributed to interested members of the public and testimony was taken.[52] The amendment was approved and passed on to the County Council for hearing and action.[53]

The King County Council scheduled a public hearing on the Comprehensive Plan and related amendments, including the subject proposed amendment, for September 20, 2004. A detailed "Notice of Public Hearing" was sent out to members of the public by August 20, 2004 [54], which included a summary of amendments.[55] Although the summary of amendments did not specifically list the three-word addition, the front page of the notice indicated that amendments proposed by the GMUAC would also be considered at the hearing.[56] The notice indicated that there would be several other amendments to KCC

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[48] GMUAC Agenda: July 13, 2004, MK 128-131, Response Exhibit 70.

[49] Striking Amendment, Version 1, MK 132-136, Response Exhibit 71.

[50] GMUAC Revised Agenda: July 13, 2004, MK 137-39, Response Exhibit 72.

[51] GMUAC Agenda: July 20, 2004, MK 140-143, Response Exhibit 73.

[52] *Id.*

[53] Striking Amendment, Version 2, MK 144-157, Response Exhibit 74.

[54] Cover Letter (August 20, 2004), CoreMK 182, Response Exhibit 76; Notice of Public Hearing, CoreMK 183, Response Exhibit 77.

[55] CoreMK 184-189, Response Exhibit 78.

[56] CoreMK 183, Response Exhibit 77.

19A.[57] The notice stated that copies of the proposed legislation would be available for public review on the County's website, at the Department of Development and Environmental Services in Renton, and at all King County Public Libraries.[58] By August 20, 2004, the Growth Management and Unincorporated Areas Committee recommended amendments were posted on the County's website.[59] By August 27, 2004, copies of the GMUAC recommended version were available at all branches of the King County library and at the Department of Development and Environmental Services in Renton.[60]

On August 18, 2004, notice of the public hearing was published in numerous local and regional newspapers, including: Seattle Post-Intelligencer, Seattle Times, Woodinville Weekly/The Northlake News/The Valley News, Enumclaw Courier Herald, Vashon Maury Island Beachcomber, Issaquah Press, West Seattle Herald/White Center News/Highline Times/Des Moines News, King County Journal, Snoqualmie Valley Record. These newspaper notices specifically mention that the original Executive recommendation had been amended by the GMUAC, that the amendments were available for review on the web, at all County libraries, and at DDES and that the GMUAC recommendations were subject to public review and comment.[61]

The King County Council held its scheduled public hearing on September 20, 2004. There was an opportunity for verbal and written public comment.[62] A second hearing was held on September 27, 2004, various amendments were voted upon, and a final vote on the amendment was held on that day.[63]

Examples of reasonable notice provisions listed in the GMA include: Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal; Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered; Placing notices in appropriate regional, neighborhood, ethnic, or trade journals; and Publishing notice in agency newsletters or sending notice to agency mailing lists,

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[57] CoreMK 188, Response Exhibit. 77.

[58] *Id.*

[59] CoreMK 182, Response Exhibit 76.

[60] *Id.*; Letter to Document Librarians, MK 158, Response Exhibit 79.

[61] Seattle Post-Intelligencer, 8/18/04, CoreMK 192, Seattle Times, 8/18/04, CoreMK 192, Woodinville Weekly/The Northlake News/The Valley News, 8/18/04, CoreMK 200 & CoreMK 202, Enumclaw Courier Herald, 8/18/04, CoreMK 206, CoreMK 207 and CoreMK 208, Vashon Maury Island Beachcomber, 8/18/04, CoreMK 214 and CoreMK 215, Issaquah Press, 8/18/04, CoreMK 223 and CoreMK 224, West Seattle Herald/White Center News/Highline Times/Des Moines News, 8/18/04, CoreMK 230 and CoreMK 231, King County Journal, 8/18/04 CoreMK 235 and CoreMK 238, Snoqualmie Valley Record, 8/18/04, CoreMK 236 and CoreMK 239, Response Exhibit 80.

[62] King County Council Meeting Agenda, Minutes, & Revised Agenda (September 20, 2004), MK 170-187, Ex. 81.

[63] King County Council Meeting Agenda, Proceedings, Vote Slip, & Signature Report (September 27, 2004), MK 188-231, Response Exhibit 82.

including general lists or lists for specific proposals or subject areas. RCW 36.70A.035(1), *Supra.* In this case the County's notice and public participation process for review, comment and adoption of the contested amendment comply with the provisions of RCW 36.70A.020(11), RCW 36.70A.035(1), RCW 36.70A.070 and RCW 36 70A.140.

RCW 36.70A.035(2) applies to amendments when "…the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change." *Supra*. In this case the change (the addition of the words "minimum lot area") was proposed during a public meeting of the GMUAC at a time when opportunities for review and comment on the proposed change continued to be available at a subsequent GMUAC meeting and at a meeting of the full County Council. These opportunities were prior to the council vote on the proposed change. The provisions of RCW 36.70A.035(2) are not applicable to the county's adoption of the contested amendment.

Petitioner claims the "…effects of the addition of three words "minimum lot area" to the Building Site definition are unknown due to the issue's very last-minute adoption without public notice or any dissemination or citizens' participation, and potential inconsistency with long-standing county assurances of the vesting of existing legal lots…". Issue No.9 *supra*. The Board has concluded above that the County's notice and public participation procedure in the review and adoption of the amendment are consistent with GMA requirements. The public, including Petitioner, had the opportunity to question the effects of the amendment and to assert inconsistency with vesting of existing legal lots, at public meetings of both the GMUAC and the County Council. Petitioner did not raise these concerns until after the amendment was adopted by the County Council.

When Petitioner did raise these concerns, a Division Director in the County department which administers the County's development codes, including KCC 19A, responded by letter to Petitioner. MK 20, Response Exhibit 69. The County letter advises Petitioner that the amendment to the definition of "Building Site" in Ordinance No 15031 is based on the requirements of RCW 58.17.040(6) which states that a building line adjustment may not result in a lot which contains insufficient area and dimensions to meet minimum requirements for width and area for a building site. The letter advises Petitioner that lots in the County which were eligible for building permits prior to the adoption of Ordinance No 15031 are still eligible for building permit, unless the configuration of the lot has been modified through a boundary line adjustment process. *Id*.

Building on rural lots is not governed by KCC 19A, but by the development standards set forth in KCC 21A. Specifically, KCC 21A.12.100 defines the "minimum lot area for construction." Pursuant to this provision, in the rural area (RA) zone "construction shall not be permitted on a lot containing less than 5,000 square feet." KCC 21A.12.100, Response Exhibit 68. It is these existing restrictions, not changed by Ordinance No 15031, that define the minimum size of a lot before building is permitted. The contested amendment in Ordinance No. 15031 is not inconsistent with King County's vesting of

existing legal lots. Petitioner states that planning goal (6) requires that property rights be protected. PHB, at 14. However petitioner has not shown that the contested amendment adversely affects property rights.

Conclusions

Petitioner has **not carried the burden of proof** in showing that Section 4 of King County Ordinance No. 15031 is non-compliant with RCW 36.70A.020, RCW 36.70A.035, RCW 36.70A.070 or RCW 36.70A.140. Legal Issue No. 9 is **dismissed.**

V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

- Petitioner has failed to carry the burden of proof in demonstrating non-compliance with the GMA as challenged in Legal Issues 1, 2, 3, 4, 5, 6, 7, and 9. Therefore these issues are **dismissed with prejudice**.

- The King County Comprehensive Plan adopted by Ordinance 15028 designates a portion of the Sammamish Agricultural Production District as both agricultural resource area and rural area. The dual designation does not comply with the consistency requirements of the RCW 36.70A.070. Therefore, King County is hereby directed to take the necessary legislative action to comply with the consistency requirements of RCW 36.70A.070 according to the following compliance schedule:

1. By no later than **November 10, 2005**, King County shall take appropriate legislative action to comply with the consistency requirements of RCW 36.70A.070.

2. By no late than **November 21, 2005**, King County shall file with the Board an original and four copies of the legislative enactment(s) adopted by King County to comply with RCW 36.70A.070 along with a statement of how the enactments comply with RCW 36.70A.070 (**Statement of Actions Taken to Comply - SATC**). The County shall simultaneously serve a copy of the legislative enactment(s) and compliance statement, with attachments, on Petitioner. By this same date, the County shall also file a "**Compliance Index**," listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony etc.) considered during the compliance period in taking the compliance action.

3. By no later than **December 5, 2005**,[64] the Petitioner may file with the Board an original and four copies of Response to the County's SATC. Petitioner shall simultaneously serve a copy of their Response to the County's SATC on the County.

4. By no later than **December 12, 2005,** the County may file with the Board an original and four copies of the County's Reply to Petitioner's Response, if any. The County shall simultaneously serve a copy of such Reply on Petitioner.

5. Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m. December 19, 2005** at the Board's offices.

If the King County takes the required legislative action prior to the November 10, 2005, deadline set forth in this Order, the County may file a motion with the Board requesting an adjustment to this compliance schedule.

If the parties [Keesling III v. King County] so stipulate, the Board will consider conducting the compliance proceeding telephonically.

So ORDERED this 31st day of May, 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Bruce C. Laing, FAICP
Board Member

_____
Edward G. McGuire, AICP
Board Member

_____
Margaret A. Pageler
Board Member (See separate dissenting opinion).

[64] December 5, 2005 is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City's remand actions comply with the Legal Issues addressed and remanded in this FDO.

Note: This Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

APPENDIX - A

Procedural History of CPSGMHB Case No. 04-3-0024

On November 29, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Maxine Keesling (**Petitioner** or **Keesling**). The matter was assigned Case No. 04-3-0024, and is hereafter referred to as *Keesling III*. Board member Bruce Laing is the Presiding Officer (**PO**) for this matter. Petitioner challenges King County's (**Respondent** or the **County**) adoption of the following Ordinances: Ord. No. 15028 amending the Comprehensive Plan and Area Zoning; Ord. No. 15029 amending King County Code (**KCC**) provisions relating to sewer and water comprehensive plans; Ord. No. 15030 amending KCC provisions relating to transportation concurrency management; Ord. No. 15031 amending KCC provisions relating to administration and subdivisions and short subdivisions; and Ord. No. 15032 amending KCC provisions relating to zoning. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**), WAC 365-195, WAC 197-11 and WAC 173-507.

On December 10, 2004, the Board received a Notice of Appearance from legal counsel for the County.

On December 10, 2004, the Board issued a "Notice of Hearing and Potential Consolidation" (the **Notice**) in the above-captioned case and three other related cases. The Notice set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On December 13, 2004 the Board received a Notice of Appearance from the County.

On December 13, 2004, the Board received Petitioner's letter transmitting copies of King County documents referenced in the PFR.

On December 17, 2004, the Board received Petitioner's Restatement of Legal Issues

On January 3, 2005, the Board received King County's Initial Index of the Record (**Index**).[65]

On January 4, 2005, the Board conducted the prehearing conference, which involved numerous parties all challenging the same or similar ordinances adopted by the County, in Suite 2430, Union Bank of California Building, 900 4th Avenue, Seattle. Present for the Board were members Edward G. McGuire, Margaret Pageler and Bruce C. Laing, PO.

[65] The Petitioner and the Board noted concerns with the magnitude and scope of the County's Initial Index and the general nature of its references. To clarify the record for this matter, the Petitioner agreed to submit a list of potential exhibits to the County and an "inquiry" regarding the location of responses to such exhibits or related documents pertaining to Petitioner's issues. The County agreed to confirm a potential exhibit's presence in the record and identify the location of responses or related documents for Petitioner's review. The parties agreed to complete this interchange prior to the deadline for filing motions to supplement the record, thereby allowing adequate time for such motions, if necessary.

Representing the Petitioner *pro se* was Maxine Keesling. Present for the County were Peter Ramels and Steve Hobbs. The first item of business was discussion and consideration of consolidating four pending PFRs challenging the County. The Board determined that the cases would not be consolidated, but that, to the extent possible, the schedule for briefing and hearings would be coordinated. All parties concurred.

On January 6, 20054 the Board issued a Prehearing Order (**PHO**) setting forth the final schedule for this case and the legal issues to be addressed.

On January 11, 2005 the Board received "Petitioner's Motion to Supplement the Record" (**Motion to Supplement**) with two attachments.

On January 12, 2005 the Board received "King County's Supplemental Index of the Record" (**Supplemental Index**).

On January 14, 2005 the Board received "Petitioner's Motion to Clarify Standing" (**Motion on Standing**).

On January 24, 2005 the Board received a Notice of Association of Counsel from King County indicating that Stephen Hobbs has associated with Darren E. Carnell and Peter G. Ramels on behalf of King County.

On January 26, 2005 the Board received from the County Core Documents (**Core**) requested by the Board during the PHC. The documents and their sequential page numbers are as follows: Ordinance 15028 (**Core 0001 – 0018**); County Comprehensive Plan & Maps – Attachment A to Ordinance 15028 (**Core 0019 – 0496);** County Countywide Planning Policies (**Core 0497 – 0587**); Ordinance 15029 (**CoreMK 0001 – 0016);** Ordinance 15030 (**CoreMK 0017 – 0042**); Ordinance 15031 (**CoreMK 0043 – 0048**); Ordinance 15032 (**CoreMK 0049 – 0181**); Notices of Hearings (**CoreMK 0182 – 0244**).

On February 4, 2005 the Board issued its Order on Motions which admitted the Core Documents received from the County on January 26, 2005, the Keesling letter of January 9, 2004 (**Supplemental Exhibit No. 1**) and Petitioner's Motion to Clarify Standing (**Supplemental Exhibit No. 2**).

On February 4, 2005 the Board received King County's Second Supplemental Index.

On February 16, 2005 the Board received a one page document entitled "Petitioner's Motion to Supplement the Record".

On February 25, 2005 the Board received a letter from King County regarding Core Documents, transmitting a bound copy of the King County Comprehensive Plan 2004 and three copies of "Chapter Three, Section D: Mineral Resources" which were omitted from the Core Documents submitted to the Board on January 26, 2005.

On February 25, 2005 the Board received a letter from King County transmitting two items: Color copy of Concurrency Map – Chapter 14 marked **CoreMK 245**; Concurrency Map Attachment B marked **CoreMK 246**.

On March 1, 2005 the Board received Petitioner's Preliminary Brief together with an Index of Issues for Brief, an Index of Exhibits, and attached exhibits. The attached exhibits include pages from the Core Documents and pages marked **MK 1 thru MK 33.** Two additional pages are not numbered.

On March 8, 2005 the Board issued its Order Amending Time of Hearing on the Merits.

On March 17, 2005 the Board received Petitioner's letter transmitting copies of the following exhibits which were referenced in Petitioner's Prehearing Brief but omitted from the attachments to that brief: Exhibits No. Core-MK 000006, No. Core-MK 000009 and No. MK-000020.

On March 17, 2005 the Board issued its Second Order Amending Time of the Hearing on the Merits.

On March 22, 2005 the Board received Respondent King County's Prehearing Brief with an Exhibit List and attached exhibits. The attached exhibits include pages from the Core Documents and pages marked **MK 35 thru MK 231.**

On March 31, 2004 the Board conducted a Hearing on the Merits (**HOM**) in Suite 2430, Union Bank of California Building 900 Fourth Avenue, Seattle, Washington. Board Members present were Margaret Pageler, Edward McGuire and Bruce Laing, Presiding Officer. Maxine Keesling represented the Petitioner, *pro se*. Stephen Hobbs, Senior Deputy Prosecuting Attorney, represented King County. The Court Reporter was Eva Jankovits, Byers & Anderson, Inc. The hearing was opened at 10:10 a.m. and adjourned at 11:46 a.m. Prior the presentation of oral arguments the Presiding Officer denied "Petitioner's Motion to Supplement the Record", received February 16, 2005, on the basis that the body of the motion is a request to amend the Legal Issues set forth in the Prehearing Order. During the HOM the Board directed counsel for the County to determine, and report to the Board, whether the 2003 Countywide Planning Policies cited in the County's brief were the applicable Countywide Planning Policies at the time the County's 2004 Comprehensive plan was prepared and adopted. The Board did not order a transcript of the HOM.

On April 4, 2005 the Board received Petitioner's Request for Clarification of the Presiding Officer's denial of the February 16, 2005 "Petitioner's Motion to Supplement the Record". The Board's Administrative Officer advised the Petitioner by telephone that the Board had received the Request for Clarification and would address the request in the Board's Final Decision and Order.

On April 4, 2005 the Board received Correspondence from counsel for the County stating: "At the time of the passage of the 2004 Comprehensive Plan, the Countywide Planning Policies in effect were identical to the 2003 Countywide Planning Policies

attached as a core document in this appeal, with the exception of an amendment ratified June 4, 2004, concerning the City of Auburn's downtown urban core."

On May 31, 2005 the Board Issued its Final Decision and Order for Case No. 04-3-0024.

APPENDIX – B

21A.14.040 Lot segregations - clustered development. Residential lot clustering is allowed in the R, UR and RA zones. If residential lot clustering is proposed, the following requirements shall be met:

A. In the R zones, any designated open space tract resulting from lot clustering shall not be altered or disturbed except as specified on recorded documents creating the open space. Open spaces may be retained under ownership by the subdivider, conveyed to residents of the development or conveyed to a third party. If access to the open space is provided, the access shall be located in a separate tract;

B. In the RA zone:

1. No more than eight lots of less than two and one-half acres shall be allowed in a cluster;

2. No more than eight lots of less than two and one-half acres shall be served by a single cul-de-sac street;

3. Clusters containing two or more lots of less than two and one-half acres, whether in the same or adjacent developments, shall be separated from similar clusters by at least one hundred twenty feet;

4. The overall amount, and the individual degree of clustering shall be limited to a level that can be adequately served by rural facilities and services, including, but not limited to, on-site sewage disposal systems and rural roadways;

5. A fifty-foot Type II landscaping screen, as defined in KCC 21A.16.040, shall be provided along the frontage of all public roads. The planting materials shall consist of species that are native to the Puget Sound region. Preservation of existing healthy vegetation is encouraged and may be used to augment new plantings to meet the requirements of this section;

6. Except as provided in subsection B.7. of this section, open space tracts created by clustering in the RA zone shall be designated as permanent open space. Acceptable uses within open space tracts are passive recreation, with no development of active recreational facilities, natural-surface pedestrian and equestrian foot trails and passive recreational facilities;

7. In the RA zone a resource land tract may be created through a cluster development in lieu of an open space tract. The resource land tract may be used as a working forest or farm if the following provisions are met:

a. Appropriateness of the tract for forestry or agriculture has been determined by the county;

b. The subdivider shall prepare a forest management plan, which must be reviewed and approved by the King County department of natural resources and parks, or a farm management plan, if a plan is required under KCC chapter 21A.30, which must be developed by the King Conservation District. The criteria for management of a resource land tract established through a cluster development in the RA zone shall be set forth in a public rule. The criteria must assure that forestry or farming will remain as a sustainable use of the resource land tract and that structures supportive of forestry and agriculture may be allowed in the resource land tract. The criteria must also set impervious surface limitations and identify the type of buildings or structures that will be allowed within the resource land tract;

c. The recorded plat or short plat shall designate the resource land tract as a working forest or farm;

d. Resource land tracts that are conveyed to residents of the development shall be retained in undivided interest by the residents of the subdivision or short subdivision;

e. A homeowners association shall be established to assure implementation of the forest management plan or farm management plan if the resource land tract is retained in undivided interest by the residents of the subdivision or short subdivision;

f. The subdivider shall file a notice with the King County department of executive services, records, elections and licensing services division. The required contents and form of the notice shall be set forth in a public rule. The notice shall inform the property owner or owners that the resource land tract is designated as a working forest or farm, which must be managed in accordance with the provisions established in the approved forest management plan or farm management plan;

g. The subdivider shall provide to the department proof of the approval of the forest management plan or farm management plan and the filing of the notice required in subsection B.7.f. of this section before recording of the final plat or short plat;

h. The notice shall run with the land; and

i. Natural-surface pedestrian and equestrian foot trails, passive recreation, and passive recreational facilities, with no development of active recreational facilities, are allowed uses in resource land tracts;

8. For purposes of this section, passive recreational facilities include trail access points, small scale parking areas and restroom facilities; and

9. The requirements of subsection B.1., 2, or 3. of this subsection may be modified or waived by the director if the property is encumbered by critical areas containing habitat for, or there is the presence of, species listed as threatened or endangered under the Endangered Species Act when it is necessary to protect the habitat; and

C. In the R-1 zone, open space tracts created by clustering required by KCC 21A.12.030 shall be located and configured to create urban separators and greenbelts as required by the Comprehensive Plan, or subarea plans or open space functional plans, to connect and increase protective buffers for critical areas, to connect and protect wildlife habitat corridors designated by the Comprehensive Plan and to connect existing or planned public parks or trails. The department may require open space tracts created under this subsection to be dedicated to an appropriate managing public agency or qualifying private entity such as a nature conservancy. In the absence of such a requirement, open space tracts shall be retained in undivided interest by the residents of the subdivision or short subdivision. A homeowners association shall be established for maintenance of the open space tract.